

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

Petition of the Verizon Telephone  
Companies for Forbearance Under 47  
U.S.C. § 160(c) from Title II and  
Computer Inquiry Rules  
with Respect to Their Broadband  
Services

WC Docket No. 04-440

**COMMENTS OF THE CITY OF BOSTON IN SUPPORT MOTION FOR  
EXPEDITED ORDER ON VERIZON PETITION FOR FORBEARANCE**

**I. BACKGROUND**

On December 20, 2004, Verizon filed a petition seeking forbearance ("Petition") pursuant to Section 10 of the Communications Act of 1934, as amended ("Act").<sup>1</sup> Verizon sought relief from Title II of the Act as well as relief from the Commission's Computer Inquiry rules<sup>2</sup> to the extent those rules were imposed on Verizon's broadband services. On December 19, 2005, a day before the petition would be

---

<sup>1</sup> *Petition of the Verizon Telephone Companies/or Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Their Broadband Services*, WC Docket No. 04-440 (filed Dec. 20, 2004) ("Verizon Forbearance Petition").

<sup>2</sup> *See Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities*, Final Decision and Order, 28 F.C.C.2d 267 (1971); *Amendment of Section 64.702 of the Commission's Rules and Regulations*, Final Decision, 77 F.C.C.2d 384 (1980); *Computer III Further Remand Proceedings: Bell Operating Co. Provision of Enhanced Services; 1998 Biennial*

granted due to lack of FCC action, the Commission extended the deadline for reaching a decision on the petition for an additional 90 days or until March 19, 2006.

Despite this extension of time, and the vocal, substantive and timely opposition filed to the Petition,<sup>3</sup> the Commission failed to act in a timely manner and relief was deemed granted by operation of law as reflected in a news release.<sup>4</sup> On July 25<sup>th</sup>, Covad Communications Group, Nuvox Communications, Inc., and XO Communications LLC filed a Motion for Expedited Order<sup>5</sup> asking the FCC to deny the relief sought by Verizon in its Petition or in the alternative to issue a written order limiting any relief to an *ex parte* presentation<sup>6</sup> made by Verizon during the 90

---

*Review - Review of Computer III and ONA Safeguards and Requirements*, Report and Order, 14 FCC Rcd. 4289 (1999) (collectively the "Computer Inquiry" rules).

<sup>3</sup> The City of Boston voiced in opposition to the relief requested as part of the "Local Government Coalition." See *Reply Comments of Local Government Coalition*, WC Docket No. 04-440 (filed March 10, 2005.)

<sup>4</sup> Verizon Telephone Companies' Petition for Forbearance from Title II and Computer Inquiry Rules with Respect to their Broadband Services Is Granted by Operation of Law, Public Notice, WC Docket No. 04-440 (reI. Mar. 20, 2006) ("News Release"). The FCC's action, or lack thereof, has been challenged by a number of parties. The appeals have been consolidated before the U.S. Court of Appeals for the D.C. Circuit. See *Sprint Nextel Corp. v FCC*, Case No. 06-1111 (D.C. Cir).

<sup>5</sup> *Motion for Expedited Order* by Covad Communications Group, Nuvox Communications, Inc., and XO Communications LLC, WC Docket No. 04-440 (filed July 25, 2007) ("Motion").

<sup>6</sup> *Letter from Edward Shakin, Vice President & Associate General Counsel, Verizon, to Marlene Dortch, Secretary, Federal Communications Commission*, WC Docket No. 04-440 (filed Feb. 7, 2006) ("Shakin Letter"). The broadband services specified by Verizon include Frame Relay Service, ATM Cell Relay Service, Internet

grace period. By Public Notice released July 30, 2007, the Wireline Competition Bureau invited parties to share their opinions on the Motion.<sup>7</sup>

## II. SUMMARY

The City of Boston files these comments in support of the Motion for the following reasons:

- Boston continues to believe that Verizon has failed to meet its statutory burden of demonstrating that forbearance is warranted in the instant matter, as Verizon's petition was too vague to adequately analyze the request on the merits.<sup>8</sup>
- The business of the FCC cannot be conducted by news release.<sup>9</sup>

---

Protocol-Virtual Private Network (IP-VPN) Service, Transparent LAN Service, LAN Extension Service, IntelliLight Broadband Transport, Custom Connect, Verizon Optical Networking, Optical Rubbing Service, and IntelliLight Optical Transport Service. *Id.*, Attachment 1.

<sup>7</sup> Public Notice, *Wireline Competition Bureau Seeks Comment on the Motion of Covad Communications Group, Nuvox Communications, Inc., and XO Communications, LLC for Expedited Order on Verizon Petition for Forbearance*, WC Docket No. 04-440 (filed July 30, 2007) ("Public Notice").

<sup>8</sup> The City of Boston reiterates its opposition to the underlying relief sought as first voiced as a member of the Local Government Coalition filing on March 10, 2005. The City incorporates by reference those comments herein.

<sup>9</sup> Chairman Dingell has chastised the Commission "for the alarming practice ...regulating by press release." He, like many of us, finds such actions to be "a curious way to interpret the Administrative Procedures Act." *See* Statement of Congressman John D. Dingell, Chairman Committee on Energy and Commerce before the Subcommittee on Telecommunications and the Internet Hearing entitled: "Oversight of the Federal Communications Commission." (March 14, 2007) *available at* [http://energycommerce.house.gov/Press\\_110/110st21.shtml](http://energycommerce.house.gov/Press_110/110st21.shtml) ("Dingell Statement").

- The Act<sup>10</sup> and the Administrative Procedures Act (5 U.S.C. §§ 551-599, 701-06, 1305, 3105, 3344, 5372, 7521) require the FCC to provide Verizon, similarly situated companies, impacted competitors, consumers, and reviewing courts a clear statement of what, if any, relief is granted. As House Energy & Commerce Committee Chairman John Dingell recently noted: “Because the Commission failed to release an Order, it is not clear as to the precise relief granted or the reason for the decision. It is not apparent to me how the public or the courts can judge the wisdom of agency action in such circumstances.”<sup>11</sup>
- This confusion will be exacerbated as the Commission is asked to act upon "me-too" petitions filed by Qwest Corp., AT&T Inc., BellSouth Corp., Frontier and Citizens, and the Embarq local operating companies.<sup>12</sup>

---

<sup>10</sup> 47 U.S.C. § 160(c) provides “The Commission may grant or deny a petition in whole or in part and ***shall explain its decision in writing***” (emphasis provided)

<sup>11</sup>Dingell Statement at 1.

<sup>12</sup> See *Qwest Petition for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect To Broadband Services*, WC Docket No. 06-125, (“Qwest Forbearance Petition”); *Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) from Title II And Computer Inquiry with Respect to its Broadband Services*, WC Docket No. 06-125, (“AT&T Forbearance Petition”); *Petition of BellSouth Corporation for Forbearance Under 47 U.S.C. § 160(c) From Title II and Computer Inquiry Rules With Respect to its Broadband Services*, WC Docket No. 06-125 (“BellSouth Forbearance Petition”); *Petition of the Embarq Local Operating Companies for Forbearance Under 47 U.S.C. § 160(c) from Application of Computer Inquiry and Certain Title II Common-Carriage Requirements*, WC Docket No. 06-147 (Embarq Forbearance Petition”); *Petition of the Frontier and Citizens Incumbent Local Exchange Carriers for Forbearance under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Their Broadband Services*, WC Docket No. 06-147, (“Frontier Forbearance Petition”).

- A “deemed granted by operation of law” order does not bar subsequent action by the Commission to meet its obligations to the Congress and the public.

### III. INTRODUCTION

The City files these comments in three capacities:

- Boston is a, if not the, major consumer of telecommunications services in the Boston MSA. In 2006 the City of Boston expended \$ \$5.425 million on communications services. Any actions taken by the Commission the jeopardize Boston’s ability to obtain the benefits of a competitive market place will result in the city, like other major users, being required to find additional resources to pay a monopoly annuity to Verizon.<sup>13</sup>
- The City of Boston owns, or holds in trust, the majority of the rights-of-way found in the Boston MSA. If competitive broadband competitors are denied access to Verizon’s broadband network, then the City and its citizens will again be forced to suffer through wholesale street openings and other disruptions as a result of

---

<sup>13</sup> Of the \$5.425M the City of Boston spent on wireline communications services in 2006, a little more than \$2M was spent on voice services and about \$3M on data lines and services, including T-1, ISDN and ATM networks. This amount does not include the substantial amount spent by the city on wireless services. Despite this market power, the City notes that no customer is big enough to be protected from anti-competitive actions. Boston would reference for the Commission’s attention the predicament New York outlined in a recent filing.

Prior to the Verizon/MCI merger, the City had negotiated with MCI a contract for voice and data services. When the merger occurred prior to the negotiated contract becoming final, Verizon repudiated the contract and instead was only willing to offer the City the same services for higher prices and on less favorable terms. With no comparable alternative available, the City had to accept the revised contract.

competitive providers needing to replace the infrastructure on which their current business plans rely.<sup>14</sup>

- Finally, while the Commission and others might question what role the City plays in consumer protection in a broadband era, make no mistake that the residents of Boston look to the Mayor and other elected officials at the level of government closest to them for protection. Because forbearance jeopardizes broadband competition in Boston, the City requests that the Commission consider the impact that the requested grant would have on every business and residential consumer in Boston.

#### **IV. UNDERLYING PETITION FAILED TO MEET 16o(C) STANDARDS**

The City of Boston reiterates its opposition to the underlying relief sought by Verizon in either its original Petition or as outlined in the Shakin letter of February 7, 2006. Boston continues to believe that Verizon has failed to meet its statutory burden of demonstrating that forbearance is warranted. Verizon's petition was too vague to adequately analyze the request on its merits. The City first voiced these objections as a leading member of many of the numerous organizations aligned under the banner of the "Local Government Coalition," which filed in opposition to the petition on March 10, 2005. The City incorporates by reference those comments herein.

---

<sup>14</sup> Boston also questions at what point does Verizon need to surrender its preferred status under various laws, including but not limited to 47 U.S.C. § 253 if the company continues to refuse to honor the common carrier, interconnection and universal service obligations that allowed the company to gain such a preferred status.

## V. WHAT WAS “DEEMED GRANTED” -- THE NEED FOR CLARITY

Great Confusion has resulted from the Commission’s failure to act on Verizon’s original petition; and its allowing Verizon to amend, or replace, the petition by means of an *ex parte* letter long after time had expired on the original petition.<sup>15</sup> What relief was deemed granted? Is it the relief sought in the original Petition or the relief outlined in the February 7, 2006 *ex parte* letter? (In the Shakin letter, Verizon informed the Commission that it sought relief only for: “(1) packet- switched services capable of 200 kbps in each direction (for example, frame relay, ATM, IP-VPN and Ethernet); and (2) non- TDM based optical networking, optical hubbing and optical transmission services that are transmission services provided over optical facilities at OCn speeds.”<sup>16</sup> )

The FCC, like all other federal agencies, must comply with the requirements of the Administrative Procedure Act. ( 5 U.S.C. §§ 551-599, 701-06, 1305, 3105, 3344, 5372, 7521.) In the instant matter the Commission did provide interested persons an opportunity to participate in the proceeding through the submission of written data, views and arguments (5 U.S.C. § 553). The Commission failed to publish a detailed order as required by Section 552 of the APA, specifically 5 U.S.C. § 552(a)(1)(D) & (E). The Commission also failed to meet the requirements of 47 U.S.C. § 160 (c) that it “explain its decision in writing.”

---

<sup>15</sup> This appeared to be an effort to achieve a 2 to 2 stalemate at the Commission. Due to a vacancy in one of the five commission seats during the time in question, such a deadlock vote was possible. Commissioner McDowell has since joined the Commission and his recusal period had run. A final decision, rather than a 2 to 2 stalemate, is thus achievable.

The Commission should embrace the opportunity Movants have offered to remedy these two errors. The Commission should issue an order denying the relief sought in the original petition, and then subject the Shakin letter to a standard forbearance analysis. Regardless of the Commission's decision, after such an analysis has been conducted, all parties will be better served. At present we have no insight into the Commission's standards and logic when addressing forbearance petitions.<sup>17</sup>

#### **VI. THE COMMISSION HAS AUTHORITY TO ISSUE AN ORDER ADDRESSING THE MERITS OF VERIZON'S BROADBAND FORBEARANCE PETITION**

The Commission retains authority to act in this matter even after a “deemed granted by law” news release has been issued and appeals taken.

In Core Communications, the Commission concluded that "section 160(c) provides for an interim 'deemed' grant of a forbearance petition that the Commission fails to deny within the statutory deadline, but that the agency retains the authority thereafter to deny or grant the petition in whole or in par, and to 'explain its decision in writing.' This is exactly the relief requested here.<sup>18</sup>

In the alternative, the City of Boston suggests that the Shakin *ex parte* letter could be viewed as a free standing petition for relief that substituted for the original petition for

---

<sup>16</sup> Motion at 4, referencing the Shakin Letter at 2-3.

<sup>17</sup> The need for insight into the Commission's thinking and standards becomes increasingly important as the extensions of the various “me too” petitions identified in note 11, *supra*, expire.

<sup>18</sup> Motion at 12.



relief.<sup>19</sup> As the Shakin letter notes: while the petitioner's name is the same, it is not the same company as a result of the MCI merger, (p. 2, nt.1). Boston asks the FCC to clarify what competitive market was used as the base for determining the need for the underlying regulations that Verizon seeks to avoid: Was it a marketplace that included MCI as a competitor, or was it the market in which MCI has been subsumed in Verizon? Since the latter market is far different from the former, the competitive nature of the company and the continued need for regulation under Section 160 could require re-evaluation.

## VII. CONCLUSION

For all of the foregoing reasons, the City of Boston urges the Commission to expeditiously grant Movants' Motion. Specifically, the City calls upon the Commission to adopt and issue a written order addressing the merits of the Verizon broadband forbearance petition in accordance with Section 10(a) of the Act. The City of Boston further believes that absent denial of the underlying Petition, the Commission must establish in writing what if any relief is granted, as there is currently grave confusion in the marketplace as to what rules apply to Verizon's broadband services.

Respectfully submitted,

***Of Counsel***

Donna Sorgi, Esquire  
Assistant Corporation Counsel  
City of Boston

/s/

Gerry L. Lederer  
Miller & Van Eaton, P.L.L.C.

---

<sup>19</sup> It is also interesting to note that on a number of occasions Mr. Shakin references the December 20, 2004 petition as the original petition, (*See* p. 2) outlines the relief being sought in the present tense as opposed to referring back to (by then) a 14-month old petition, and reflects how the request is not only narrowed, but how the law had changed with the intervening broadband wireline order. *See Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853 (2005)

Attorneys for the City of Boston

Mike Lynch  
Director Cable & OTC/MIS  
City of Boston  
43 Hawkins Street  
Boston, Massachusetts 02114  
6020\01\00130978.DOC